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Fair Hill Property Sdn Bhd v Ngui Cheng Yew & Anor

HIGH COURT (KUCHING) — APPLICATION FOR JUDICIAL REVIEW NO KCH-13JR-5/6 OF 2013
RHODZARIAH BUJANG J
3 MARCH 2014

Civil Procedure — Judicial review — Consumer Claims Tribunal ('CCT'), decision of — CCT ordered property developer to refund booking fee property buyer had paid — Booking fee forfeited by developer on buyer's failure to sign sale and purchase agreement — Developer contended CCT had no jurisdiction to adjudicate buyer's claim as payment of booking fee not covered by Consumer Protection Act 1999 ('Act') — Whether booking fee was 'contractual right' falling within definition of 'services' under Act — Whether Housing Tribunal under Housing Developers (Control and Licensing) Ordinance 1993 had no jurisdiction to adjudicate buyer's claim as parties had not signed sale and purchase agreement — Whether developer had shown decision making of CCT was tainted by procedural impropriety, illegality or irrationality

The Consumer Claims Tribunal ('the CCT') had ordered the applicant, a property developer, to refund to the first respondent ('Ngui') a booking fee of RM10,000 Ngui had paid for the purchase of a property developed by the applicant. Ngui was unable to proceed with the purchase because he had failed to obtain a bank loan. The applicant forfeited the booking fee after giving Ngui notice that he had failed to execute a sale and purchase agreement concerning the property. Although the applicant participated in the hearing before the CCT, its instant application sought to quash the CCT's decision on the ground it did not have jurisdiction to adjudicate on Ngui's claim. It was contended that Ngui should instead have filed his claim with the Housing Tribunal ('the HT') established under the Housing Developers (Control and Licensing) Ordinance 1993. The applicant claimed the CCT did not have jurisdiction because payment of the booking fee did not fall within the definition of 'goods' and 'services' under the Consumer Protection Act 1999 ('the Act'). As the instant application was in the form of a judicial review of the CCT's decision under O 53 of the Rules of Court 2012 ('the ROC'), an objection was taken by Ngui that the amended notice of hearing filed by the applicant was defective for failing to state the relief claimed from the court as required under O 53 r 2(1) of the ROC.

Held, dismissing the application with costs RM3,000:

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(1) In view of the provisions of s 17H read with s 17J(3) of the Ordinance, the HT had no jurisdiction to adjudicate on Ngui's claim because the parties had not entered into a sale and purchase agreement (see paras 4–5).

(2) The payment of the booking fee was a contractual right falling within the meaning of 'services' as defined under s 2 of the Act (thus giving the CCT jurisdiction to adjudicate on Ngui's claim) (see para 7).

(3) As the applicant failed to prove that there was procedural impropriety in the decision making of the CCT or that its decision was illegal or irrational, the application had to be dismissed (see para 10).

(4) Although the applicant's amended notice of hearing failed to state the relief claimed, the court was willing to overlook the omission under O 1A of the ROC as no prejudice had been caused to Ngui for he had notice, through the amended statement and affidavit which were served together with the notice of hearing, of the relief that was claimed against him (see para 2).

[Bahasa Malaysia summary

Tribunal Tuntutan Pengguna ('TTP') telah memerintahkan pemohon pemaju perumahan, untuk membayar balik kepada responden pertama ('Ngui') fi tempahan sebanyak RM10,000 yang dibayar oleh Ngui untuk pembelian rumah yang dibina oleh pemohon. Ngui tidak dapat meneruskan dengan pembelian kerana dia gagal untuk mendapatkan pinjaman bank. Pemohon kehilangan fi tempahan selepas memberi Ngui notis yang dia gagal untuk melaksanakan perjanjian jual beli berkenaan hartanah tersebut. Walaupun pemohon mengambil bahagian dalam pendengaran di hadapan TTP, permohonan ini adalah untuk memohon membatalkan keputusan TTP atas alasan ia tidak mempunyai bidang kuasa untuk membuat keputusan tentang tuntutan Ngui. Dihujahkan bahawa Ngui sepatutnya memfailkan tuntutannya dengan Tribunal Perumahan ('TP') yang ditubuhkan di bawah Ordinan Pemaju-Pemaju Perumahan (Kawalan dan Lesen) 1993 ('Ordinan'). Pemohon mendakwa TTP tidak mempunyai bidang kuasa kerana bayaran fi tempahan tidak terangkum dalam maksud 'goods' dan 'services' di bawah Akta Pelindungan Pengguna 1999 ('Akta'). Memandangkan permohonan ini dalam bentuk semakan kehakiman terhadap keputusan TTP di bawah A 53 Kaedah-Kaedah Mahkamah 2012 ('KKM'), bantahan yang diambil oleh Ngui bahawa notis pendengaran yang dipinda yang difailkan oleh pemohon adalah cacat kerana gagal untuk menyatakan relief yang dituntut daripada mahkamah seperti yang dikehendaki di bawah A 53 k 2(1) KKM.

Diputuskan, menolak permohonan dengan kos sebanyak RM3,000:

(1) Mengambil kira peruntukan s 17H dibaca bersama s 17J(3) Ordinan, TP tidak mempunyai bidang kuasa untuk membuat keputusan tentang

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tuntutan Ngui kerana pihak-pihak tidak memasuki perjanjian jual beli (lihat perenggan 4–5).

(2) Bayaran fi tempahan adalah hak kontrak yang terangkum dalam maksud 'services' seperti yang didefinisikan di bawah s 2 Akta (dengan itu memberi bidang kuasa kepada TTP untuk membuat keputusan tentang tuntutan Ngui) (lihat perenggan 7).

(3) Memandangkan pemohon gagal untuk membuktikan bahawa terdapat prosedur yang tidak sesuai dalam keputusan TTP atau keputusannya adalah tak sah atau tidak rasional, permohonan terpaksa ditolak (lihat perenggan 10).

(4) Walaupun notis pendengaran dipinda pemohon gagal untuk menyatakan relief yang dituntut, mahkamah sanggup untuk tidak mengendahkan ketinggalan di bawah A 1A KKM memandangkan tiada prejudis terhadap Ngui dibuat kerana dia mendapat notis, melalui penyataan yang dipinda dan afidavit yang diserahkan bersama dengan notis pendengaran, terhadap relief yang dituntut terhadapnya (lihat perenggan 2).]

Cases referred to

Essex County Council v Essex Incorporated Congregational Church Union [1963] 1 All ER 326, HL (refd)

Lee Teng Siong v Lee Kheng Lian & Ors [2006] 5 MLJ 609; [2006] 4 CLJ 443, CA (refd)

Tenby World Sdn Bhd v Soh Chong Wan & Anor [2013] MLJU 579; [2013] 1 LNS 341, HC (distd)

Legislation referred to

Consumer Protection Act 1999 ss 2, 2(2), 98(1), 99, 100, 104
Education Act 1996
Housing Developers (Control and Licensing) Ordinance 1993 ss 17H, 17I(1), 17J, 17J(3)
Rules of Court 2012 O 1A, O 53 rr 2(1), 3(2), Form 109

Chan Kung Moh (Suhaili & Bong Advocates) for the applicant.
Yap Khan Kee (Ee & Lim Advocates) for the respondents.

Rhodzariah Bujang J:

[1] This is an application made by a property developer to quash the decision of the Consumer Claims Tribunal made on 13 June 2013 in allowing a refund of a booking fee (of RM10,000) paid by the buyer for a property known as Sublot 10 Fair Hill Park developed by the applicant. The forfeiture of the booking fee was on account of the buyer's failure, despite notices given by post,

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telephone calls and a formal written one on 24 April 2013 to execute the sale and purchase agreement pertaining to the purchase. His reason for not going ahead with the purchase was a failure to get a loan from OUB Bank and Maybank to complete the transaction. The booking fee was paid on 14 January 2013. The buyer's claim was filed with the Consumer Claims Tribunal on the same day as the formal written notice of the developer, that is 24 April 2013. The developer participated at the hearing before the Consumer Claims Tribunal although now in this application to quash the decision of the said tribunal, they have raised the sole issue of the jurisdiction of the Consumer Claims Tribunal to adjudicate the claim of the buyer, contending that the claim should have been filed under the tribunal for housing established under the Housing Developers (Control and Licensing) Ordinance 1993 ('the Housing Tribunal'). I said 'sole issue' because that is precisely what they have stated in their amended statement pursuant to O 53 r 3(2) of the Rules of Court 2012 ('the Rules') but before going into the merit of this application, I will consider the buyer's counsel, Ms Yap Khan Kee's first objection to the application.

RELIEF NOT STATED

[2] Under O 53 r 2(1) of the said Rules, it is provided that an application for judicial review shall be in Form 109. In Form 109, it is further required that an applicant for a judicial review to state the relief claimed from the court. The amended notice of hearing filed in this case does not contain the relief claimed although in the statement (as I mentioned earlier) and the affidavit served with the said notice, the relief prayed for is alluded to. Therefore, it is an omission that I am willing to overlook given that the buyer was notified through these other documents of the relief claimed against him. In doing so, I invoke my discretion under O 1A of the Rules as there was no prejudice caused to the buyer on account of the omission to state the said relief in the amended notice.

ARGUMENT ON THE MERIT

[3] The jurisdiction of a housing tribunal is defined under s 17H read with ss 17I(1) and 17J of the Housing Developers (Control and Licensing) Ordinance 1993. These three sections provide as follows:

> Section 17H
>
> A purchaser may lodge with the Tribunal a claim in the prescribed form, together with the prescribed fees, for any loss suffered or any matter concerning his *interests under a sale and purchase agreement.* (Emphasis added.)
>
> Section 17I(1)
>
> Subject to section 17J, the Tribunal shall have jurisdiction to hear a claim lodged under section 17H where the total amount in respect of which an award of the Tribunal is sought does not exceed forty thousand ringgit:
>
> Provided that if agreed by the parties and approved by the Minister, the Tribunal

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may hear a claim not exceeding eighty thousand ringgit.

Section 17J

(1) Except as expressly provided under this Ordinance, the Tribunal shall have no jurisdiction in respect of any claim:

(a) for the recovery of land, or any estate or interest in land;

(b) in which there is a dispute concerning:

(i) the entitlement of any person under a will or settlement, or on intestacy (including partial intestacy);

(ii) goodwill;

(iii) any chose in action; or

(iv) any trade secret or other intellectual property rights.

(2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from a sale and purchase agreement entered into between the purchaser and the licensed housing developer.

(3) *Notwithstanding subsection (2), no claim shall be affected or defeated on the ground that no sale and purchase agreement has been entered into between the purchaser and the licensed housing developer at the time when the cause of action accrues if there exists a previous dealing between the purchase and the licensed housing developer in respect of the acquisition of the housing accommodation.* (Emphasis added.)

(4) The Tribunal shall have no jurisdiction:

(a) to hear a claim arising from personal injury or death; or

(b) to award a prohibitory, mandamus, declaration, specific performance or an injunction order.

[4] Ms Yap Khan Kee submitted that the buyer could not have filed his claim with the Housing Tribunal because no sale and purchase agreement has been entered between the parties and I think this is a valid argument in view of not just the clear wordings as emphasised in s 17H but also s 17J(3) where the law made an exception and conferred jurisdiction to the Housing Tribunal in cases where even if there were no sale and purchase agreement executed by the parties, there was a previous dealings between them for the acquisition of housing accommodation.

[5] Whilst my reading and interpretation of the relevant provisions above shows that the Housing Tribunal has no jurisdiction to adjudicate the buyer's claim, it still behoves upon me to consider whether the Consumer Claims Tribunal did. For that I have to look at the governing legislation, the Consumer Protection Act 1999 ('the Act').

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A JURISDICTION OF THE CONSUMER CLAIMS TRIBUNAL

[6] Section 98(1) provides as follows:

B (1) Subject to section 99 and 100, the Tribunal shall have jurisdiction to hear consumer claims within the ambit of this Act including claims in respect of all *goods* and *services for which no redress mechanism is provided for under any other law and where the total amount in respect of which an award of the Tribunal is sought does not exceed twenty-five thousand ringgit.* (Emphasis added.)

C **[7]** There are other subsequent provisions on the jurisdiction of the Consumer Claims Tribunal, either to limit, enlarge or exclude it such as ss 99, 100 and 104 of the Act but they are not relevant to this application. What is relevant, according to the submission of Ms Yap Khan Kee is the words I emphasised in s 98(1) ie 'goods and services for which no redress mechanism is provided for under any other law'. However, Mr Chan Khoon Moh for the D developer submitted that the Consumer Claims Tribunal has no jurisdiction because the payment of the booking fee in this case does not fall into the definition of 'goods' and 'services' under the Act and that the Consumer Claims Tribunal's jurisdiction is only attached if the claim falls within the definition of the said terms under the Act. The definition section, which is s 2 defines 'goods' E and 'services' as follows:

'goods' means goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes:

F (a) goods attached to, or incorporated in, any real or personal property;

(b) animals, including fish;

(c) vessels and vehicles;

(d) utilities; and

G (e) trees, plants and crops whether on, under or attached to land or not, but does not include *choses in action*, including negotiable instruments, shares, debentures and money.

and

'services' includes any rights, benefits, privileges or facilities that are or are to be H provided, granted or conferred under any contract but does not include rights, benefits or privileges in the form of the supply of goods or the performance of work under a contract of service.

[8] With respect to Mr Chan Khoon Moh, the payment of the booking fee I is definitely a contractual right falling under the meaning of 'service' as defined above. The case of *Tenby World Sdn Bhd v Soh Chong Wan & Anor* [2013] MLJU 579; [2013] 1 LNS 341 cited by him as authority is distinguishable because of the application of s 2(2) of the Act in that the claim for the refund of the deposit paid to a private educational institution comes under the

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purview of the Education Act 1996 and the said sub-s 2 clearly excludes the application of the 'services provided by professionals who are regulated by any written law'.

[9] As for Ms Yap Khan Kee's submission that it is now too late for the buyer to dispute the jurisdiction of the Consumer Claims Tribunal, I need only refer to the decision of the Court of Appeal in *Lee Teng Siong v Lee Kheng Lian & Ors* [2006] 5 MLJ 609 at p 617; [2006] 4 CLJ 443 at p 12 which applied the principle laid down in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] 1 All ER 326 at p 330 that no consent can confer on a court or tribunal with limited jurisdiction any power to act beyond that jurisdiction or can estopped the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction. Gopal Sri Ram JCA held that any irregularity may be waived by the court but not a want jurisdiction.

[10] However, as the developer is required by case law but failed to prove that there was procedural impropriety in the decision making of the tribunal or that its decision was illegal and irrational as decided in a host of cases which have been well summarised in *Tenby World*'s case, I have no alternative but to dismiss the application with cost of RM3,000.

Application dismissed with costs RM3,000.

Reported by Ashok Kumar